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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~72~~ - 261

JAMES O. MILLER,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH I. STONE
Attorney for Petitioner
277 Broadway
New York, New York 10007

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No.

JAMES O. MILLER

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States*:

The Petitioner, James O. Miller, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on July 17, 1972.

A. The Opinion Below

There was no opinion by the Second Circuit Court of Appeals who affirmed the case after hearing oral argument on July 17, 1972. The defendant was convicted after trial for violating Sections 173 and 174, Title 21, United States Code, and was sentenced to a term of fifteen years in prison

on March 3, 1972. The defendant has been released on bail in the sum of fifty thousand dollars since his sentence of March 3, 1972. A request was submitted to the Circuit Court of Appeals on July 24, 1972, for a stay of the mandate and for bail pending certiorari to the Supreme Court of the United States. There has been no decision on this application as of this date.

B. Jurisdiction

The judgment of the Court of Appeals was entered on July 17, 1972, and the jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Can an alleged buyer of small amounts of cocaine be charged with knowledge of illegal importation?

2. Can a person be a member of a conspiracy if the proof fails to show that he knows any of the conspirators?

3. Can a New York State wiretap be used in Federal Court without the proper federal safeguards?

4. Can a defendant be compelled to go on trial without the attorney of his choosing at a complicated multiple conspiracy case on twenty-four hours notice?

5. Must a defendant have notice that his telephone was tapped within the statutory period of time?

D. United States Constitution and the Statutes

United States Constitution, Fourth Amendment.

United States Code, Title 21, Sections 173, 174.

United States Code, Title 18, Sections 2510-2518.

E. Summary Statement of Matters Involved

The above defendant-appellant, along with several other defendants, was arrested in August, 1971, and charged with violating the federal narcotic laws. The arrest of petitioner James O. Miller was predicated upon a wiretap order which was signed on September 3, 1970, by Justice Jawn A. Sandifer, Supreme Court, New York County. After this wiretap, detectives obtained a wiretap for co-defendant Enrique Hernandez and co-defendant Madeline Pineda. There were no federal safeguards attached to the issuance of this wiretap order or for the return of this wiretap order as they were solely within the jurisdiction of New York State.

A seizure of narcotics was made from co-defendants Madeline Pineda, Martin Hernandez and Victor Hernandez and co-conspirator Mario Sepulveda on November 6, 1970. Pineda and the two Hernandez boys went to trial in Westchester County and were convicted while Mario Sepulveda acted as an informer for the government, testifying both in the state prosecution and in the federal prosecution. Of all the defendants tried, petitioner James O. Miller is the only person who was not identified by any co-conspirator who testified. The complete government case was based upon the fact that Miller had telephone conversations with Enrique

Hernandez which were interpreted by police officers as having a narcotic connotation.

The actual wiretap conversations admitted into evidence indicated that if anything, Miller was a buyer of narcotics from Hernandez and there was no proof as to the amounts of narcotics purchased and Miller was not charged with being in actual possession of any narcotics. It should be conceded by the government that the narcotic in question here was cocaine. The trial court failed to charge that petitioner Miller *must* have had actual or constructive possession of the cocaine or he *must* have had actual knowledge of the illegal importation of the cocaine under the doctrine set forth in this Court in *Turner* v. *U. S.*, 390 U.S. 398. There was a hearing after trial to determine whether or not Miller received the statutory notice showing that his phone was tapped. The Court held that even though he received this notice *after* the statutory period of time as prescribed by Congress, it was not instrumental in setting aside his conviction. This rule has not been decided by any circuit court of appeals. However, Judge Weinstein's opinion in this case is contrary to Judge Muir's opinion in *U. S.* v. *Eastman*, 326 F. Supp. 1038.

F. Reasons for Granting Writ

POINT I

This Court should grant a writ of certiorari to clarify the decision in *Turner* v. *U. S.*, 390 U.S. 398. The facts in this case are contrary to the Court's reasoning that cocaine could be purchased domestically. The Second Circuit Court of Appeals in *Gonzalez* v. *U. S.*, 442 F 2d 698, reasoned that a substantial amount of cocaine found to be in possession

of a person destroys the inference that the source of a large amount of cocaine could be a domestic source. In this particular case, the prosecution was unable to show that Miller had either actual knowledge that the cocaine hydrochloride was illegally imported nor was the prosecution able to show that Miller was in possession of any *large* quantity of cocaine.

POINT II

This Court should grant a writ of certiorari to review the "independent proof" test of who becomes a member of a conspiracy. The government's main witnesses, co-conspirators Sepulveda and Valverde testified against all other members of the conspiracy as to certain meetings, conversations and deliveries of narcotics. At no time did either Valverde or Sepulveda ever meet petitioner Miller nor hear his name mentioned by any other co-conspirator. This Court should grant the writ to amplify decisions of the Circuit Court set forth in *U.S.* v. *Consolidated Laundries*, 291 F. 2d 563 and *U.S.* v. *Stromberg*, 268 F. 2d 256.

POINT III

This Court should grant a writ of certiorari to determine whether the New York Code of Criminal Procedure, Sections 813 to 822, properly conform to the federal wiretap statutes, Title 18, Sections 2510, et seq. The wiretap utilized in this particular case was placed on the telephone of James Miller on September 3, 1970, pursuant to an order of New York State Supreme Court Justice Jawn A. Sandifer and signed by Frank Hogan, the duly elected District Attorney of New York County. The New York Code of

Criminal Procedure provides for a return and inventory of all telephonic intercepted conversations within a statutory period. This specified time period is synonymous with the federal law. This Court should determine whether a New York State wiretap can properly be admitted into federal court unless it meets all of the federal safeguards and allows the federal judiciary a complete and independent inquiry; for this Court has always stated that an independent inquiry in the admissibility and legality of evidence is necessary, *Elkins* v. *U.S.*, 364 U.S. 206.

It is further noted that the federal wiretap laws demand that the Attorney General or his duly designated representative must sign the affidavit which is submitted ex-parte to a federal judge. The federal statutes do not state that a district attorney, even though duly elected in a state jurisdiction, is competent to sign a wiretap affidavit in a federal proceeding.

POINT IV

This Court should grant a writ of certiorari to determine whether or not it is reasonable to compel a defendant to proceed to trial or face the alternative choice of immediate incarceration unless he permits a new attorney to defend him on twenty-four hours notice. It is alleged that even the finest attorney cannot properly defend any person in a complicated multi-conspiracy trial on twenty-four hours notice. The judge's coercion as indicated in the annexed exhibit(B) indicates that the defendant's federal safeguards under the Sixth Amendment were completely emasculated.

POINT V

This Court should grant a writ of certiorari to determine whether the constitutional safeguards concerning the return on a wiretap within the statutory period of time necessarily vitiates the use of any wiretap evidence. The Fourth Amendment of the United States Constitution and Title 18, United States Code, Section 2518(8d) require a defendant who is subjected to a wiretap be furnished with inventory and notice under specific time limitations. The failure of New York State to properly comply with the federal statute should require the conviction of James O. Miller be set aside under the doctrine of *Alderman* v. *U.S.*, 394 U.S. 165, and the dictum opinion of the Supreme Court in *U.S.* v. *Disist*, 394 U.S. 244 and to clarify Judge Muir's decision in *U.S.* v. *Eastman*, 326 F. Supp. 1038, where he stated "The failure to serve the requisite inventory and notice vitiates the wiretap and precludes the use of evidence derived therefrom."

CONCLUSION

In conclusion, the writ of certiorari should be granted and the Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

JOSEPH I. STONE
Attorney for Petitioner
Member of the Bar of the
Supreme Court of the
United States
Office & P.O. Address
277 Broadway
New York, New York 10007

EXHIBIT A

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and seventy-two.

Present:

HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NICODEMUS OLATE-ROMERO, JUSTO QUINTANILLA, a/k/a ARNALDO, LUIS CAROL OTEY-AMPUERO, EDUARDO BORRONE-IGLAR, AMADA RAMIREZ, MADELAINE PINEDA, AGAPITO-GU-LEON, VICTOR HERNANDEZ, MARTIN HERNANDEZ, ENRIQUE HERNANDEZ, JOSEPH GERNIE, JAMES MILLER, a/k/a PLUG-GIE, MANUEL FIGUEROA-MILLA, a/k/a PAJARITO, MANUEL BRITO SALINAS a/k/a JOHN DOE,
Defendants,

EDUARDO BORRONE-IGLAR, MADELAINE, PINEADA, VICTOR HERNANDEZ, MARTIN HERNANDEZ, ENRIQUE HERNANDEZ, JOSEPH GERNIE, MANUEL FIGUEROA-MILLA, AGAPITO GU-LEON, JAMES MILLER,
Defendants-Appellants.

Exhibit A

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was urged by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they are hereby affirmed as to all appellants except appellants Joseph Gernie and Eduardo Borrone-Iglar and as to appellant Joseph Gernie decision be and it hereby is reserved.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

EXHIBIT B

Telegraphic Message

NOVEMBER 29, 1971

TO:
EDWARD LEOPOLD, ESQ.
COHEN, LEOPOLD & POVERSTEIN
44 COURT STREET
BROOKLYN, NEW YORK 11201

RE: USA v. OLATE-ROMERO, et al, 71-CR-874

YOUR LETTER OF NOVEMBER 26, 1971 SEEKING AN ADJOURNMENT IN THE CASE SET FOR TRIAL ON DECEMBER 2, 1971 IS DENIED. FAILURE TO INFORM THE COURT UNTIL THIS DATE OF THE FACT THAT YOU HAD BEGUN A CASE ON NOVEMBER 8TH KNOWING THAT IT WOULD PROBABLY INTERFERE WITH YOUR COMMITMENT TO THIS COURT IS NOT UNDERSTOOD BY THIS COURT. IN VIEW OF MULTIPLE DEFENDANTS AND COUNSEL, ALL COUNSEL WERE ADVISED THAT THE DATE SET WAS FIRM AND THAT IF ANY COUNSEL COULD NOT APPEAR HE WAS TO INFORM HIS CLIENT IMMEDIATELY SO THAT HIS CLIENT COULD OBTAIN OTHER COUNSEL.

YOU AND YOUR CLIENT WILL APPEAR IN THIS COURT TOMORROW, NOVEMBER 30, 1971 AT 9:00 A.M. TO EXPLAIN YOUR FAILURE TO COMPLY WITH THIS COURT'S ORDER. FAILURE OF YOUR CLIENT TO HAVE COUNSEL AVAILABLE FOR THE TRIAL WILL RESULT IN HIS BEING INCARCER-

Exhibit B

ATED. THE COURT RESERVES THE RIGHT TO TAKE SUCH OTHER ACTION AS IS APPROPRIATE AGAINST YOU AND YOUR CLIENT INDIVIDUALLY. SO ORDERED.

JACK B. WEINSTEIN
JUDGE, UNITED STATES DISTRICT COURT